Supreme Court, U.S.
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No. 10-___

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND ITS INDIVIDUAL MEMBERS,

PETITIONERS,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2011

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QUESTION PRESENTED

The court of appeals held in this case that land transfers by the United States Army Corps of Engineers to the State of South Dakota pursuant to the Water Resources Development Act of 1999 did not violate §§ 605(b)(3) and (c)(1)(B) of that Act because they did not include lands within the "external boundaries" of the Yankton Sioux Reservation. The petitions and conditional cross-petition for a writ of certiorari in Nos. 10-929, 10-931, and 10-932 concern the boundaries of that reservation. The question presented is whether to hold this petition and then dispose of it as appropriate in light of the Court's disposition of those other petitions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, respondents include Pete Geren, Secretary of Army; George S. Dunlop, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert L. Van Antwerp, Chief of Engineers; David C. Press, Omaha District Commander and District Engineer; United States of America; State of South Dakota; Jeff Vonk, Secretary of the Department of Game, Fish, and Parks for the State of South Dakota; and John Does, Contractors.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 606 F.3d 895, and reproduced at Pet. App. 1-11. The unpublished order of the court of appeals denying rehearing en banc is reproduced at Pet. App. 51.

The district court's unpublished opinion granting respondents' motion for summary judgment is reproduced at Pet. App. 22-31. The district court's unpublished decision denying petitioners' motion for relief from the judgment is reproduced at Pet. App. 14-21.

JURISDICTION

The court of appeals rendered its decision on June 2, 2010, and denied a timely petition for rehearing en banc on September 23, 2010. Pet. App. 51. On December 17, 2010, Justice Alito extended the time for filing a petition for certiorari to and including February 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), requires the United States Army Corps of Engineers to transfer fee title to certain "land and recreation areas" to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses." WRDA § 605(a)(1).

Subsections 605(b) and 605(c), as amended, describe the land to be transferred as land that "is located outside the external boundaries of a reservation of any Indian tribe." WRDA §§ 605(b)(3), 605(c)(1)(B).

Subsection 607(a), as amended, states that:

> (a) IN GENERAL.—Nothing in this title diminishes or affects—
>
> (1) any water right of any Indian Tribe;
>
> (2) any other right of any Indian Tribe, except as specifically provided in another provision of this title;
>
> (3) any treaty right that is in effect on the date of enactment of this Act;
>
> (4) any external boundary of any Indian reservation of any Indian Tribe;
>
> (5) any authority of the State of South Dakota that relates to the protection, regulation, or management of fish, terrestrial wildlife, and cultural and archaeological resources, except as specifically provided in this title; or
>
> (6) any authority of the Secretary, the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act....

WRDA § 607(a).

STATEMENT OF THE CASE

This is a companion case to *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), which is

the subject of three petitions for a writ of certiorari by state and local entities, as well as a conditional cross-petition by the Yankton Sioux Tribe. That case and this one turn on the same basic question: whether certain lands within the historic Yankton Sioux Reservation have lost their reservation status.

This case involves the reservation status of approximately 1,100 acres of recreational land that the United States Army Corps of Engineers ("Corps") transferred to the State of South Dakota pursuant to the Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000). The WRDA specifically limits transfers to areas "outside the external boundaries of a reservation of any Indian tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B);[1] *see also id.* § 607(a)(4). Because the relevant areas are all located within the original boundaries of the Yankton Sioux Reservation, the validity of the Army Corps' land transfer turns on whether the Yankton Sioux Reservation has been diminished to such an extent that it no longer includes these areas. That is the same question presented in *Podhradsky*.

In *Podhradsky*, the Tribe will file a brief in opposition explaining why this Court should deny review in that case, and thus ultimately deny this hold petition as well. But if this Court were to grant the petitions and conditional cross-petition in

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[1] The Eighth Circuit opinion refers to WRDA § 605(c)(2), which Congress redesignated as § 605(c)(1)(B) in the 2000 amendments.

Podhradsky, there would be no reason not to hold this petition. In that scenario, this Court's decision in *Podhradsky* would govern this case as well. Accordingly, the Court should hold this petition for *Podhradsky*, and then consider it in light of the Court's disposition of *Podhradsky*.

A. Historical Background

1. An 1858 Treaty between the Yankton Sioux Tribe and the United States established the original boundaries of the Yankton Sioux Reservation. *See* Treaty of Apr. 19, 1858 ("1858 Treaty"), 11 Stat. 743. The Tribe ceded to the United States over 11 million acres of its aboriginal lands, and retained 430,405 acres in what is today Charles Mix County, South Dakota, as its reservation. *See id.* at 744.

2. Three decades later, Congress changed policies in the Dawes Act or General Allotment Act of 1887, ch. 119, 24 Stat. 388, *repealed in part*, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000). The Dawes Act reflected a federal policy of opening up lands for settlement, and breaking up reservations into smaller pieces, through the "allotment" of reservation parcels to individual Tribe members. The United States was to hold each allotted parcel in trust "for the sole use and benefit of the Indian [allottee]" for 25 years; after that time, the Tribe member would assume fee simple ownership of the parcel and could freely alienate it. *Id.* at 389. The Dawes Act further authorized the Executive Branch to "negotiate" with the Tribe to purchase, "in conformity with the treaty or statute under which such reservation is held," the *unallotted* portions of the reservation on "just and equitable" terms. *Id.*

The United States allotted over three-fifths of the 1858 Yankton Sioux Reservation under the Dawes Act in a patchwork of scattered, noncontiguous parcels. That left approximately two-fifths of the reservation lands — 168,000 acres — unallotted. In 1894, the United States reached an agreement with the Tribe to purchase those unallotted acres for $600,000. *See* Act of Aug. 15, 1894 ("1894 Act"), ch. 290, art. 20, 28 Stat. 286, 319. The Yankton Sioux Tribe thereby surrendered approximately 168,000 acres from its 430,405-acre reservation, leaving approximately 262,300 acres of allotted lands.

In submitting the agreement to Congress, the Commissioners who had negotiated the agreement explained that the Yankton Sioux Indians "were not selling their whole reservation, but less than two-fifths of it," and "more than three-fifths of it would remain in their possession for such cultivation and improvement as Indians will give to it." Report of the Yankton Indian Commission (Mar. 31, 1893), S. Exec. Doc. No. 27, at 13.

To that end, the 1894 Act stipulated various conditions for the sale that reflected Congress's expectation that a reservation would persist. Article VIII required the United States to set aside from white settlement 1,000 acres for "agency, schools, and other purposes" for the support of the Tribe. 28 Stat. at 316. Article XIII required the United States to guarantee to "[a]ll persons who have been allotted lands on the reservation" the "undisturbed and peaceable possession of their allotted lands." *Id.* And Article XIV prohibited Congress from "pass[ing]

any act alienating any part of these allotted lands from the Indians." *Id.* at 317.

4. By the early twentieth century, the issuance of fee patents, often well before the 25-year trust period had duly expired, "left many Indians landless." *Podhradsky*, 606 F.3d at 1000. The federal government also acknowledged that its policy of encouraging assimilation had failed in light of the Indians' "'cultural resilience.'" *Id.* at 1001. The government therefore extended, re-extended, and then permanently extended the 25-year trust periods on parcels of the Yankton Sioux Reservation held in trust. *See id.* at 1000 (citing Exec. Order No. 2363, Apr. 20, 1916; Exec. Order No. 4406, Mar. 30, 1926; Exec. Order No. 5173, Aug. 9, 1929); 25 U.S.C. § 462. In 1929, rather than open the 1,000 acres of agency reserve lands to non-Indian settlers, Congress returned the lands to the Tribe and specifically prohibited their allotment. *See* Act of February 13, 1929, ch. 183, 45 Stat. 1167.

The Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*), extended those policies. In addition to putting an end to further allotment and extending the trust periods for outstanding allotments indefinitely, the IRA authorized the Secretary of the Interior to acquire additional lands in trust to create or add to tribal reservations. Under the IRA, the federal government has taken nearly 6,500 acres into trust for the benefit of the Yankton Sioux Tribe. *Podhradsky*, 606 F.3d at 1001.

B. Proceedings Below

1. The first of these related cases began when the Yankton Sioux Tribe, faced with imminent construction of a waste site on land within the 1858 boundaries of the reservation, sought to ensure that federal environmental protections applied to the site. This Court held that the Tribe's cession of the 168,000 acres of unallotted lands to the United States had diminished the original 1858 reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998). Because the waste site lay on ceded land, the Court concluded that it was not within the diminished reservation and therefore was not subject to federal environmental regulation. *Id.* at 340, 358.

This Court did not reach the broader question whether the 1894 Act had "disestablished" the Yankton Sioux Reservation in its entirety. *Id.* at 358. The Court noted, however, that some clauses of the 1894 Act "contradict[ed]" and "counsel[ed] against finding the reservation terminated." *Id.* at 350. Specifically, the Court pointed to Article VIII, which required the United States to reserve lands "for agency, schools, and other purposes," 28 Stat. at 316, observing that it was "'difficult to imagine'" why Congress would have reserved such agency trust lands "'if it did not anticipate that the opened area would remain part of the reservation.'" *Yankton*, 522 U.S. at 350 (quoting *Solem v. Bartlett*, 465 U.S. 463, 474 (1984)). The Court further noted that Article XVII, which prohibited the sale of liquor on ceded lands or other lands within the reservation, "signal[ed] a jurisdictional distinction between reservation and ceded land." *Id.*

2. On remand, that case was consolidated with another one in which the Tribe contended that the reservation had been diminished only by the ceding of unallotted lands to the United States for sale to non-Indians, and that the approximately 262,300 acres of non-ceded lands and agency trust lands remained part of the reservation.

The district court agreed. Based on the text and history of the 1894 Act, the court concluded that the Yankton Sioux Reservation continued to exist after 1894. *See Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1149-56, 1159 (D.S.D. 1998). The court further determined that the reservation consisted, in diminished form, of the agency trust lands and non-ceded lands within the original 1858 reservation boundaries. *Id.* at 1159.

The Eighth Circuit affirmed in part and reversed in part. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999). Over the State's objections, the Eighth Circuit held that the 1894 Act did not disestablish the Yankton Sioux Reservation. *Id.* at 1027. At a bare minimum, the Eighth Circuit noted, the agency trust lands — which the United States returned to the Tribe in 1929 — remained part of the reservation. *Id.* The court of appeals held, however, that allotted lands lost reservation status if and when they were sold to non-Indians. *Id.* at 1028. Both the State and the Tribe sought certiorari, with the State maintaining its total disestablishment position and the Tribe maintaining that diminishment extended only to the lands ceded in 1894. This Court denied review. *See South Dakota v. Yankton Sioux Tribe*, 530 U.S. 1261 (2000).

3. On remand, the district court determined that approximately 37,600 acres of trust lands within the original 1858 boundaries retained reservation status, including: (1) the agency trust lands reserved to the United States in the 1894 Act, then returned to the Tribe in 1929; (2) the lands allotted to individual Indians that remain in trust today; (3) the lands additionally taken into trust under the 1934 IRA; and (4) the lands allotted to individual Indians that are no longer in trust but are still owned in fee by Tribe members. *See Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1058 (D.S.D. 2007).

4. The same district court judge simultaneously presided over this case, in which the Tribe challenges land transfers by the U.S. Army Corps of Engineers to South Dakota under the Water Resources Development Act. *See* Pet. App. 34-50. There is no dispute that the disputed 1,100 acres of land lie within the original 1858 reservation boundaries: the 971-acre North Point Recreation Area, the 44-acre White Swan Recreation Area, and the 70-acre Spillway Recreation Area.

The Tribe argued that the lands were reservation lands and thus not subject to transfer under the WRDA, which authorizes transfer only of lands "outside the external boundaries" of Indian reservations. WRDA §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4). Both the United States and South Dakota took the position that, under the Eighth Circuit's decision in *Gaffey*, the lands at issue were outside the diminished reservation. State CA8 Br. 41-43; U.S. CA8 Br. 18-20. The United States emphasized, however, that in its view "*Gaffey* was

wrongly decided to the extent it held the reservation was diminished beyond the 1894 cession of land." U.S. CA8 Br. 9 n.4. The United States "reserv[ed] its right to seek en banc or Supreme Court review in *Gaffey/Podhradsky*." *Id.*

When the district court issued its *Podhradsky* decision, it requested supplemental briefing on whether that decision controlled the disposition of this case. *See* Pet. App. 23. Following that briefing, the district court granted summary judgment against the Tribe on the ground that "*Podhradsky* eliminates any possibility that the Tribe can prevail ... in this lawsuit." *Id.* at 29. The court explained that none of the Corps-transferred lands fell within any of the categories of land that, under *Podhradsky*, "continue to fall within the" reservation. *Id.*

5. On appeal, the Eighth Circuit held this case for *Podhradsky*, largely affirmed the district court's *Podhradsky* opinion, and then affirmed the district court's decision in this case based on its decision in *Podhradsky*. *See id.* at 2; *Podhradsky*, 606 F.3d at 1017. In *Podhradsky*, the Eighth Circuit agreed with the district court that the diminished reservation includes (1) the agency trust lands, (2) the allotted lands that remain in trust, and (3) the lands taken into trust under the 1934 IRA. 606 F.3d at 1017. The court of appeals vacated the district court's holding that the reservation also includes allotted lands that are owned in fee by Indians but not held in trust, reasoning that the lack of a "fully developed record" on such lands meant the issue was not ripe for review. *Id.* at 1015.

In this case, the Eighth Circuit then issued a short opinion affirming the district court's grant of summary judgment against the Tribe. *See* Pet. App. 1-11. The Eighth Circuit declined to delve into the parties' "core positions" — the State's argument that the reservation was wholly disestablished, and the Tribe's argument that the reservation was diminished only by the ceded lands — because "[w]e rejected those contentions in *Podhradsky*." *Id.* at 5-6. Because most of the lands at issue passed out of trust into private non-Indian hands before the Corps acquired them, the court determined that those parcels were outside the reservation's diminished boundaries at all relevant times under its decisions in *Gaffey* and *Podhradsky*. *Id.* at 7. As for the few tracts still in trust at the time the Corps acquired them, the Eighth Circuit stated that the Corps' acquisition deprived them of reservation status in the same way that acquisition of lands by any other non-Indians would deprive them of that status under *Gaffey* and *Podhradsky*. *Id.* at 9.

6. In *Podhradsky*, the State defendants, County defendants, and Southern Missouri Recycling and Waste Management District filed petitions for certiorari seeking review of the question whether the 1894 Act wholly disestablished the Yankton Sioux Reservation (Nos. 10-929, 10-931, and 10-932). The Tribe opposes those petitions, but has filed a conditional cross-petition noting that if this Court were to grant review, it should also consider the Tribe's position that the reservation has been diminished only by the ceding of unallotted lands for sale to non-Indians in 1894.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD HOLD THIS PETITION FOR THE PETITIONS AND CONDITIONAL CROSS-PETITION IN NOS. 10-929, 10-931, AND 10-932.

The Eighth Circuit "deferred [its] ruling" in this case "pending disposition of [*Podhradsky*]," and then held that this case is controlled by *Podhradsky*. Pet. App. 2; *see also, e.g., id.* ("We now follow our recent decision in *Yankton Sioux Tribe v. Podhradsky* ... and affirm."); *id.* at 5 ("[A]pplying the diminished Reservation boundaries adopted in *Podhradsky*, we affirm."); *id.* at 6 (*Podhradsky* "is final ... and binding on our panel"). The district court and the respondents have likewise acknowledged that this case and *Podhradsky* are inextricably intertwined, and that *Podhradsky* is the lead case involving the core issues. Accordingly, this Court should follow the Eighth Circuit's lead by holding this petition for *Podhradsky*, and then disposing of it in light of the Court's disposition of the petitions and conditional cross-petition in *Podhradsky*.

1. The Water Resources Development Act of 1999 ("WRDA"), Pub. L. 106-53, 113 Stat. 269, *as amended by* Pub. L. 106-541, § 540, 114 Stat. 2572 (2000), limited the Corps' authority to transfer recreation areas to those areas "located outside the external boundaries of a reservation of any Indian Tribe." *Id.* §§ 605(b)(3), 605(c)(1)(B); *see also id.* § 607(a)(4).

As the Eighth Circuit explained, the lands at stake are "within the 1858 Reservation boundaries," but were allotted and "sold to non-Indians." Pet.

App. 6. Because "*Podhradsky* held that the Reservation now consists of allotted land that remained in trust and other trust lands, but *does not include allotted land that passed out of Indian hands*," the Eighth Circuit concluded that none of the lands at issue in this case were within the Reservation's boundaries at the time the Army Corps transferred them to the State. *Id.* at 7 (emphasis added).

The Eighth Circuit explained that most of the lands had passed into private, non-Indian hands before the Corps acquired them, and were thus squarely controlled by *Podhradsky*. *Id.* The Eighth Circuit also noted that the United States had held a few of the other tracts in trust for the benefit of allottees at the time that the Army Corps acquired them in condemnation proceedings approximately 60 years ago, before Congress enacted the WRDA. *Id.* at 7-8. Again referring to its rationale in *Podhradsky*, the court concluded that, because transfer into the hands of the United States for unrelated purposes is passage out of trust, the lands' transfer to the Corps diminished the Reservation under the rationale of *Podhradsky*. *Id.*; *see also id.* at 10 (explaining that "the transfer from Indian ownership diminished the Reservation, regardless of the identity of the transferee").

2. The district court and the respondents have likewise emphasized that the correct disposition of this case turns on *Podhradsky*. Simultaneous with the issuance of its *Podhradsky* opinion in December 2007, the district court ordered the parties to file briefs and supporting materials on the question whether the decision in *Podhradsky* controlled this

case. *Id.* at 23. The court then ruled that "*Podhradsky* eliminates any possibility that the Tribe can prevail ... in this lawsuit." *Id.* at 29.

The respondents also devoted near-singular attention to the implications of *Podhradsky* and the Eighth Circuit's earlier *Gaffey* decision. *See* State CA8 Br. 36 ("Under *Gaffey* and *Podhradsky*, the answer [to the validity of the Corps' land transfers] is simple."); U.S. CA8 Br. 36 (stating that "the transferred land left Indian hands and is subject to the holding in *Gaffey*," but that *Gaffey* was wrongly decided).

Indeed, the United States filed a motion — supported by the State — to hold this case in abeyance in the Eighth Circuit because "the ultimate disposition of *Podhradsky* may affect the outcome of this case." U.S. Motion for Abeyance at 5, dated Sept. 2, 2009; *see also* Letter from State, dated Sept. 8, 2009 (supporting U.S. Motion). The State similarly indicated in an August 28, 2009, letter that it would likely seek rehearing en banc in *Podhradsky* and the appeal in this case should be held in abeyance pending that petition. As noted above, the Eighth Circuit agreed insofar as it "deferred [its] ruling pending disposition of" *Podhradsky*. Pet. App. 2. There is no reason for this Court to take a different approach.

CONCLUSION

This Court should hold the petition and dispose of it in accordance with this Court's disposition of the petitions and conditional cross-petition in Nos. 10-929, 10-931, and 10-932.

Respectfully submitted,

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